fore the section had no application. Moreover, it was argued that the confession could not be said to be made in the "presence" of the Magistrate because section 26 of the Evidence Ordinance must be construed as requiring not only mere physical presence on the part of the Magistrate but presence in the sense of being able to hear and understand everything said by the prisoner. Again it was said that the English translation of what the appellant said was not admissible because it was hearsay evidence. It was the Magistrate's record not of what the appellant said to him but of what the interpreter said the appellant had said.

In support of this argument our attention was invited to the ruling of Gorman J., in the case of *R.* v. *Attard*[2]. In that case the accused who was a Maltese was alleged to have made a statement to a Police Officer through an interpreter and the prosecution tendered the Police Officer's evidence as to that statement but did not propose to call the interpreter as a witness. Gorman J., held that in all the circumstances of the case "the evidence ought not to be given through the mouth of the Detective Superintendent".

Although we were impressed with the way in which the point was urged upon us by Mr. Shankar, in our opinion it is without real substance.

As regards *Attard's case* there is all the difference in the world between that case and the present one because in the present case the interpreter was called as a witness as well as the Magistrate.

What is more in point is the judgment of this Court in the case of *Cheong See Leong* v. *Public Prosecutor*[3]. That was a case where the Court was concerned with a statement made through an interpreter to a Police Officer under the Emergency Regulations. In the course of the judgment it was said by Spenser Wilkinson J.:—

> "The only practicable way in which one person can make a statement to another in a language that the latter does not understand is either by signs or through interpretation. In the ordinary way an independent interpreter ..... may be taken as being a mere 'conduit-pipe' incapable of invention to the detriment of the accused. A statement thus made through a mere 'conduit-pipe' by an accused to a Police Inspector is, in our view a statement properly made by him to the Inspector."

In the event the statement in question in that case was held to have been wrongly admitted on the ground that the interpreter who was used was likely to have been biased and the passage which has been quoted must therefore be treated as *obiter* and not necessarily binding on us. Nevertheless it states a view which we consider to be correct and which has been implicitly accepted in this country ever since the commencement of the administration of justice on modern lines. It is indeed no exaggeration to say that if such a view were not accepted and acted upon by the Courts the administration of justice would in many cases be literally impossible. In the present case, for example, the appellant speaks the "Hoi Luk Fung" dialect which no Magistrate in the country understands. If a suitable interpreter is not to be regarded in effect as part of the Magistrate then so far as concerns people speaking that dialect and indeed many other Chinese and Indian dialects section 115 of the Criminal Procedure Code (and a number of other provisions of our law) might as well be erased from the statute book. Every Judge and every Magistrate spends at least half his working time listening to interpreters translating into English or Malay evidence which as it comes from the lips of witnesses he cannot understand. In one way or another the sanction of an oath or affirmation is always present to ensure honesty of translation. But translation there must be and the provisions of the Code of Criminal Procedure must be interpreted in the light of that necessity.

To our mind this argument of necessity is overwhelmingly strong. It can, however, be reinforced by an argument of principle. Confining the argument for the moment to section 115 of the Criminal Procedure Code and section 26 of the Evidence Ordinance, what is the object of saying the confession must be made to a Magistrate? What is the object of saying that the confession must be made in the presence of a Magistrate? In both cases it is to ensure that confessions are not improperly obtained and to ensure that if they are made at all they are made in conditions that guarantee their voluntary nature. It seems to us that in view of the constant practice of the Courts in working through interpreters and the very great experience that Magistrates have in this type of working this object is as effectively attained where the Magistrate joins with himself an independent interpreter as when the Magistrate is able to function alone without any such assistance.

In all the circumstances we are of the opinion that in the present case the confession was properly admitted.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

PUBLIC PROSECUTOR v. ONG KEE SEONG

[A. Cr. J. (Ismail Khan J.) February 15, 1960]

[Seremban — Criminal Appeal No. 16 of 1959]

Criminal Law and Procedure — Appeal against acquittal on two charges — Withdrawal of appeal against one — Effect of.

Search — No search warrant — Raid on premises "on the instruction of the O.C.P.D." — Resistance to arrest by show of force — Penal Code, ss.352 and 353.

In this case the respondent was charged on two counts: (1) gaming, punishable under section 6(1) of the Common Gaming Houses Ordinance, 1953 and (2) using criminal force on two police officers, punishable under section 353 of the Penal Code. The charges were separately tried and in both cases the respondent was acquitted without being called on to enter his defence. The prosecution appealed against the acquittal in both cases, but withdrew the appeal on the first charge.

According to the prosecution, a gazetted senior police officer with a party of police officers conducted a raid on the premises in question "on the instruction of the O.C.P.D." There was no search warrant, nor was the search made in compliance with section 18(1)(d) of the Common Gaming Houses Ordinance. During the course of the raid the respondent resisted arrest by a show of force, to wit he kicked in the abdomen of one officer and bit the leg of another.

Held: (1) the effect of the acquittal of the respondent on the first charge, in view of the withdrawal of the appeal against it, was that the innocence of the respondent on the charge of gaming in a common gaming house was completely established;

(2) irrespective of whether the entry and search is legal or illegal, the powers of a police officer to arrest a person are limited and the exercise of such powers can only be justified on statutory grounds. In this case the offence in the first charge was a non-seizable offence and the purported arrest of the respondent could, on the facts of the case, neither be justified under section 24 of the Criminal Procedure Code nor under section 23(i)(e), and therefore the arrest itself was illegal and the resistance thereto was not unlawful. Consequently the respondent was not guilty of the offence under section 353 of the Penal Code;

(3) As in this case there was a *prima facie* case under section 352 of the Penal Code, the case must be remitted to the Magistrate for him to amend the charge accordingly and call on the respondent for his defence.

Cases referred to:—

(1) *Re Lim Kwang Teik & Ors.* [1954] M.L.J. 159.

(2) *Chandra Prasad* v. *Emperor* A.I.R. 1937 Patna 501.

(3) *Faquira & Anor.* v. *Emperor* A.I.R. 1929 All. 909.

(4) *Nonelal Gul Prasad* v. *Emperor* A.I.R. 1946 Nag. 26.

MAGISTRATE'S CRIMINAL APPEAL.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the appellant.

Khoo Eng Chin for the respondent.

Ismail Khan J.: These are two appeals by the Public Prosecutor against the acquittal of the respondent on the following charges:—

"That you on 8.2.59 at about 12.10 p.m. at house No. 91, Dangi New Village, in the District of Kuala Pilah, in the State of Negri Sembilan, were found gaming to wit a game of 'PAKAU' in the said premises and that you have thereby committed an offence punishable under Section 6(1) of the Common Gaming Houses Ordinance 26/53.

2. That you on the same date, time and place did use criminal force to P.C. 27619 Abu Chik and P.C. 6717 Sham Singh public servants to wit by punching P.C. 27619 and biting P.C. 6717 in the execution of their duties as such public servants with intent to deter the said P.C. 27619 & P.C. 6717 from discharging of their duties as such public servants and that you have thereby committed an offence punishable under Section 353 of the Penal Code."

These charges were tried separately and in both cases the learned Magistrate did not call on the respondent to enter on his defence. In the consolidated judgment the learned Magistrate commented on the failure of the prosecution to produce all available evidence and concluded "finally on listening to the submission of defence counsel with which I agree and perusing the evidence adduced by the prosecution, I find that the ingredients of the charge have not been established and acquitted and discharged accused without calling for the defence" reasons which are not very illuminating.

The appeal against acquittal on the first charge was however withdrawn and the effect of such acquittal is that the innocence of the respondent of having participated in a pakau game in a common gaming house is completely established.

The learned Deputy invited me to consider the evidence recorded in respect of the first charge in support of his contention that the entry by the police officers was a lawful entry under the Ordinance and that the arrest was legal and justified in the circumstances and that resistance to such arrest was unlawful. I declined to do so for the simple reason that even if the entry was not under the Ordinance, if in fact gaming was going on, and there was other evidence to show that the public or any class of the public had or might have access to the premises for the purpose of gaming, the offence could have been proved aliunde.

It is possible that on that particular charge the defence may not have considered it necessary to examine the prosecution witnesses on the legality of the entry. I do not, however, feel justified in looking at evidence extraneous to the record in respect of the second charge.

According to the prosecution, P.W. 1 a gazetted senior police officer under the Common Gaming Houses Ordinance, 1953, at about 12.10 p.m. on 8th February, 1959, with a party of police officers conducted a raid on premises No. 71 at Dangi Village where he arrested seven persons one of whom was the accused. During the course of the raid the accused attempted to escape. In trying to effect his capture it is alleged that P.W. 3 was kicked in the abdomen and P.W. 4 was bitten in the leg by the accused. The accused was eventually arrested. There was admittedly in this case no search warrant and search without warrant can only be justified under the Ordinance or under section 116 of the Criminal Procedure Code. Had the search been made in compliance with section 18(1)(d) of the Ordinance, it would have been *prima facie* legal to arrest any person found in the common gaming house.

The offence in so far as it relates to the first charge is a non-seizable offence and the purported arrest of the respondent cannot be justified under section 24 of the Criminal Procedure Code for there is no suggestion that the respondent refused to give his name and address on demand by the police officers, nor can it be justified under section 23(1)(e) of the Criminal Procedure Code for it is obvious that if the arrest itself is illegal the resistance to such arrest is not unlawful.

The powers of a police officer irrespective of whether entry and search is legal or illegal to arrest a person are limited and the exercise of such powers can only be justified on statutory grounds.

Had P.W. 1's evidence been that he raided the premises on information received and nothing more, there would have been on the authority of *Re Lim Kwang Teik & Ors.*[1] a presumption that the raid was regularly carried out under the Ordinance.

In his evidence P.W. 1 said he effected the raid under section 18 of the Ordinance, presumably under section 18(1), but made no mention of any information received. In cross-examination, however, he said that he acted "on the instructions of the O.C.P.D.". The words "on the instructions of the O.C.P.D." may well carry the implication that the O.C.P.D. authorised him to act under section 16 or 17 of the Ordinance. In either case a warrant was imperative. Or the words may mean that P.W. 1 acted on information given by the O.C.P.D. in such circumstances that the object of search would be defeated by the delay necessary for reducing the information to writing. It would have been desirable, in view of the uncertainty of the position in this case, for the prosecution to give positive evidence of compliance with all conditions necessary to make entry and search lawful. The O.C.P.D. was not called.

It cannot therefore be said that in this case the police officers in making the search and effecting the arrest were acting in exercise of their legitimate powers. There is evidence at the end of the prosecution case that the respondent resisted arrest by a show of force. As, however, in my opinion the search itself was illegal, as well as the arrest, the assault committed on the police is not punishable under section 353 of the Penal Code.

I am fortified in this view by the decisions in the following Indian cases.

In *Chandra Prasad* v. *Emperor*[2] an Excise Sub-Inspector proceeded to search the house of the accused whom he suspected of selling illicit ganja. Under the Act he had to record his reasons before he made the search. He failed to do so and when he made the search the accused assaulted him. It was held that the accused could not be convicted under section 353 as the Sub-Inspector could not be said to be acting in the exercise of his powers. In *Faquira & Anor.* v. *Emperor*[3] a Sub-Inspector raided the house of the accused upon information that the latter was in possession of illicit liquor but failed to arm himself with the necessary search warrant, and during the raid the accused assaulted him. The accused was convicted under section 353 but on appeal it was held that "in the absence of a search warrant it is more than doubtful whether it could be said that the Inspector and the constable under him were engaged in their duty as public servants, and the owner, the accused, had a right to resent invasion of his house." The conviction was set aside. In *Nonelal Gul Prasad* v. *Emperor*[4] a Tasildar made a report to the Sub-Divisional Magistrate of an offence under the Defence of India Rules against A. for making a false declaration of the quantity of wheat in his possession. The Magistrate directed him to report to the Station House Officer under the Defence of India Rule 81 which was done. While the Station House Officer was making a search of A's. house the Tasildar was present, but had no authority to issue a search warrant either under the Criminal Procedure Code or under the Defence of India Rule. At the time of the search the accused assaulted the Tasildar. It was held that the Tasildar must be deemed to have been present at the search as a public servant but not a public servant in the execution of his duty as such public servant. The offence was held to be committed under section 352 but not 353 of the Penal Code.

Although the conditions requisite to support a charge under section 353 of the Penal Code are lacking, I am satisfied that a *prima facie* case has been made out under section 352. I shall therefore remit the case to the learned Magistrate for him to amend the charge to one under section 352 for assaulting P.W. 3 only and direct him to call on the respondent for his defence.

Appeal dismissed.

Case remitted back to Magistrate.

VARATHARAJALU v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) February 21, 1960]

[Raub — Criminal Appeal No. 1 of 1960]

Criminal Law and Procedure — Cheating — Abetment — Withholding dishonoured cheques in order to help payer — No evidence of contemporaneous or prior complicity — Whether amounting to abetment of cheating.

Criminal Procedure — Confession made at inquiry — Admissibility.

This was an appeal from a conviction for the abetment of three offences of cheating by the first accused, one T.W.T., who held a licence to extract timber from the forest in Bentong issued by the District Forest Officer in that behalf. On the granting of such a licence it is the practice of the Forest Department to demand a deposit from the licensee for the purpose of ensuring that royalties could be deducted from it, if at any time the licensee is in default in the payment of royalties. It was also the rule to refuse to permit any further extraction of timber unless the deposit was kept up to the agreed amount. The allegations against the appellant were that he as the clerk at the Bentong Sub-Treasury had received certain cheques issued by the first accused in payment of royalties which had been dishonoured and returned to the Sub-Treasury, and that contrary to his duty he had failed to inform the District Officer so that the latter could prevent the extraction of further timber from the forest until payment was made to regularise the position. The appellant was alleged to have kept the dishonoured cheques in his possession for a period of 9 months without informing anyone that they had been dishonoured. On the matter coming to light, an enquiry was held by the State Financial Officer, at which the District Officer, the Sub-Treasurer, was present. At this enquiry the appellant was asked a number of questions for the purpose of ascertaining the position. During the course of this enquiry the appellant was alleged to have said that he held the cheques back in order to help T.W.T. There was no evidence whatever apart from this to connect the appellant with T.W.T.,